FILE COPY

IN THE

Supreme Court of the United States

October Term, 1960

No. 486

DANTE EDWARD GORI,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

MILTON C. WEISMAN
HARRY I. RAND
JEROME LEWIS
Attorneys for Petitioner

32 CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2005

INDEX

CITATIONS

IN THE

Supreme Court of the United States

October Term, 1960

No. 486

DANTE EDWARD GORI,

Petitioner,

—v.—

UNITED STATES OF AMERICA

BRIEF FOR PETITIONER

Opinions Below

The opinions of the Court of Appeals on the appeal from the conviction of petitioner (R. 20-34) and on the petition for rehearing (R. 36-38) are reported at 282 F. 2d 43. The opinion of the United States District Court for the Southern District of New York denying petitioner's motion to dismiss the information on the plea, *inter alia*, of double jeopardy (R. 15-17) has not been reported. The District Court rendered no other opinion.

Jurisdiction

The judgment of the Court of Appeals affirming the conviction of petitioner (R. 35) was entered on July 22, 1960. It's order denying the petition for rehearing (R. 38) was

entered on August 18, 1960. After grant of an extension of time (R. 39), the petition for a writ of certiorari was filed on October 15, 1960, and granted on December 12, 1960, limited to the question of double jeopardy presented by the petition (R. 39; 364 U. S. 917 [prelim. print]). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

1. Whether a defendant in a criminal case in the Federal courts may constitutionally be subjected to the jeopardy of a second trial where his earlier trial for the same offense terminated in a mistrial declared without his request or consent and:

(a) where the record discloses no "manifest necessity" for the declaration of mistrial;

(b) where there is, in fact, no "manifest necessity" for the declaration of mistrial; and

(c) where the trial judge believes that the prosecutor is about to engage in misconduct and abruptly declares a mistrial in the presence of the jury presumably in order to protect the rights of the defendant although the defendant is not consulted.

2. Whether the authority of the district judge to declare a mistrial, without the bar of former jeopardy attaching, is a discretionary authority reviewable by the appellate courts or an absolute and unreviewable authority.

3. If the authority is a discretionary authority, whether the declaration of a mistrial by the district judge in this case was in his sound discretion.

4. Whether the misconduct of a prosecutor can in any event afford the basis for the declaration of a mistrial by a district judge without the bar of former jeopardy attaching, where the defendant neither requests nor consents to the mistrial.

5. Whether the failure of a defendant formally to object to the district judge's abrupt declaration of a mistrial, in the presence of the jury and without first consulting with or inviting the expression of opinion by the defendant, constitutes a waiver by the defendant of his right to be free from subjection to double jeopardy for the same offense.

Constitutional Provision Involved

The Fifth Amendment to the Constitution is involved.

Statement of the Case

Petitioner, charged with having knowingly received and possessed goods stolen in interstate commerce in violation of 18 U.S.C. 659, was placed on trial before a jury in the United States District Court for the Eastern District of New York on February 4, 1959.[1] The Government proceeded with its case during the morning and early afternoon of that day. In the afternoon, during the examina-

[1] The information was in one count; it charged petitioner and one Franklin Osborne Corbett with having received and having had in their possession twenty-two cases of women's and children's gloves known to be stolen. Corbett pleaded guilty, and petitioner not guilty (R. 1-2). The opening trial statement of petitioner's counsel disclosed that petitioner would claim that he had acted without knowledge that the goods in question were stolen and only as Corbett's hired employee (R. 3).

tion of the Government's fourth witness, and without affording either party an opportunity to address himself to the propriety of such action, the district judge *sua sponte* declared a mistrial "because of the conduct of the district attorney (R. 13-15). As the court below notes, the record does not "make entirely clear the reasons which led the judge to act" (R. 24). The colloquy immediately preceding the declaration of mistrial appears in the margin.[2]

---

[2] PATRICK JOSEPH DEERY, a witness called on behalf of the Government, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. Passalacqua:

"Q. Mr. Deery, how long have you been an agent of the F.B.I.? A. Approximately eight and a half years.

"Q. Do you know the defendant Gori? A. Yes, sir, I do.

"Q. Do you know the co-defendant Corbett, who is not on trial today? A. Yes, sir.

"Q. When did you see the defendant Gori for the first time? A. February 10, 1958.

"Q. At about what time? A. Late in the evening, six o'clock.

"The Court: Please keep your voice up.

"The Witness: Yes, sir.

"Q. Were you alone or were you with another agent? A. No, I was with other agents.

"Q. Where did you see the defendant? A. I saw him in his automobile in the lower part of Manhattan, or Brooklyn. We observed his automobile at that time.

"Q. Do you recall the type of automobile he had? A. Yes, he had a—

"The Court: Mr. Passalacqua, please do not get immaterial evidence in here. I admonish you not to. Did you have a talk with him, yes or no?

"Mr. Passalacqua: Your Honor, will you please allow me—

"The Court: No, I won't allow you to try your case your way, because if you try it your way, we are going to have another mistrial.

"Mr. Passalacqua: Your Honor, I think—please allow me—

"The Court: I will give you the whole field. When I think you ought to stop, I will stop you. Go ahead, you try your case your own way.

"Mr. Passalacqua: Thank you.

After the mistrial, petitioner moved to dismiss the information on the plea of former jeopardy (R. 4-5). That motion was denied, and petitioner was subjected to retrial on the same information before another judge and jury.[3] Petitioner reasserted his plea of former jeopardy. The case was nevertheless submitted to the jury, and a verdict

---

"Q. Did you observe the defendant on February 11, 1958?

"The Court: Excluded.

"Mr. Gottesman: Objection.

"A. Yes.

"Q. When did you see the defendant Gori for the first time?

"Mr. Gottesman: Objection.

"The Court: That has already been answered, February 10th.

"Q. When did you see him for the second time? A. February...

"The Court: Excluded. You haven't even proved he saw him the second time.

"Q. Did you see him after February 10, 1958? A. Yes, I did.

"Q. Was he alone? He met another individual.

"Q. Where did you see him on February 11th?

"The Court: If you ask one more question that alludes to suspicion, I will withdraw a juror and put this case over to January of next year. Now, I want this crime proved, not nine others.

"Mr. Passalacqua: I am not referring—

"The Court: That is exactly what you are going to lead this jury to believe. These agents are helpless. They have got to—Juror No. 1, step out. I declare a mistrial and I don't care whether the action is dismissed or not. I declare a mistrial because of the conduct of the district attorney.

"Mr. Passalacqua: I am not—

"The Court: You heard me. I don't want any more District Attorneys coming down here telling me how I am going to try the cases. And tell your chief if he doesn't want to put any more cases on before me, it is alright with me. That's all" (R. 13-14).

[3] Although the opinion denying the motion for dismissal (R. 15-17) was filed on March 26, 1959, the order was entered on that opinion on July 22, 1959 (R. 19), several months after the entry of the judgment of conviction on the retrial (R. 18).

of guilty returned. On April 30, 1959, the judgment of conviction was entered and petitioner sentenced to imprisonment for a term of three and one-half years (R. 18).

Appeals were thereupon taken from the judgment of conviction and the order denying the motion to dismiss the information. The appeals were heard together before a panel of the Court of Appeals consisting of Judges Clark, Waterman and Lewis (the latter, a judge of the Tenth Circuit, sitting pursuant to statutory designation). In conference, Judges Waterman and Lewis voted to reverse and Judge Clark to affirm. Draft opinions reflecting that disagreement were then circulated among the active judges of the court. Although Judge Clark disagreed, noting that the procedure appeared "not to be a settled practice in other circuits", a majority of the active judges voted for an *in banc* disposition of the appeals, "superseding the judgment" of Judge Lewis (R. 21). On July 22, 1960, four active judges voting to affirm, Judge Waterman dissenting and Judge Lewis no longer participating, the court handed down its judgment affirming petitioner's conviction (R. 35).

The majority of the court was of the opinion that, although "the prosecutor did nothing to instigate the declaration of a mistrial and . . . was only performing his assigned duty under trying conditions", although the record does not "make entirely clear the reasons which led the judge to act," and although "the judge should have awaited a definite question which would have permitted a clear-cut ruling . . . [and] was thus over-assiduous, . . . it seems clear that he was acting according to his convictions in protecting the rights of the accused" (R. 23-24).

It concluded therefore that, notwithstanding that petitioner neither requested a mistrial nor consented thereto, petitioner was not so placed in jeopardy by the first trial as to preclude retrial and conviction for the same offense. Judge Waterman dissented, pointing out that, even on the rationale of the majority's opinion, the district judge's declaration of mistrial constituted an abuse of discretion and insisting further that "misconduct by a prosecuting attorney during trial may not deprive a defendant without his consent of the right to have that trial completed" (R. 30-31).

A petition for rehearing was filed on the grounds, *inter alia*, that the *in banc* procedure as here applied was improper and that the court was mistaken on the issue of double jeopardy. That petition was denied by *per curiam* opinion on August 18, 1960 (R. 36-38).

This Court granted certiorari, limited to the question of double jeopardy presented by the petition (R. 39; 346 U. S. 917 [prelim. print]).

Summary of Argument

A trial judge, in the exercise of his sound discretion, may declare a mistrial and subject the defendant to a second trial only in those cases where circumstances of "manifest necessity" or the ends of public justice compel an early termination of the first trial. *United States* v. *Perez*, 9 Wheat. 579. In this case, however, no necessity whatever, let alone "manifest necessity", appears for the mistrial. The considerations that moved the trial judge to act are articulated, if at all, so vaguely as to leave the court

of appeals itself in a quandary. The ruling below in effect vests absolute power in the trial judge to declare a mistrial and to subject the defendant to the jeopardy of a new trial. The decision thus marks a radical departure from, if not complete abandonment of, the *Perez* doctrine and disregards the high position that the double jeopardy cause still occupies in the fabric of our constitutional liberties. The court below directs us to no special circumstances or overriding considerations of policy which would justify so drastic a curtailment of the constitutional right.

In any event, misconduct by a prosecutor cannot constitutionally justify declaration of a mistrial and retrial of the defendant unless first he has consented to the mistrial. This rule avoids the serious constitutional question presented, in view of the Sixth Amendment guarantee of effective counsel, by declaration of a mistrial without the defendant's consent. It prevents the unilateral provocation of a mistrial by a prosecutor intent on avoiding a probable acquittal. It leaves the choice of exposure ~~between~~ to the jeopardy of successive trials ~~and~~ or protection from the prejudice resulting from prosecutor misconduct where the choice properly belongs, to the defendant and his counsel.

Petitioner in this case did not waive his rights under the double jeopardy provision. The suddenness and vehemence of the judge's declaration of mistrial made it impossible for petitioner or his counsel to speak to it. Waiver cannot be properly inferred from their failure to object after it was too late to do so.

ARGUMENT

I.

There were no circumstances of "manifest necessity" for a mistrial in this case. Absent such circumstances, petitioner's retrial violated the double jeopardy provision of the Fifth Amendment.

The Fifth Amendment's interdiction of double jeopardy on its face seems an absolute bar: no person shall "be subject for the same offence to be twice put in jeopardy of life or limb. . . ." Nevertheless, in *United States* v. *Perez*, 9 Wheat. 579 (1824), this Court quite early qualified the constitutional command, authorizing retrial of a defendant in a Federal criminal case after the first trial had been terminated by the trial court for the jury's failure to agree on a verdict. Since then, other exceptions have from time to time been engrafted on the constitutional provision. This Court recently summarized the present state of the law, as follows (*Green* v. *United States*, 355 U. S. 184, 188):[4]

> "'. . . This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. *Wade* v. *Hunter*, 336 U. S. 684; *Kepner* v. *United States*, 195 U. S. 100, 128. . . . This prevents a prosecutor or judge from subjecting a defen-

[4] Recent opinions announced in this Court contain comprehensive exegeses of the double jeopardy provision, its origins and its history in this Court. See *Green* v. *United States*, 355 U. S. 184; *Bartkus* v. *Illinois*, 359 U. S. 121; *Abbate* v. *United States*, 359 U. S. 187; see, also, Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1 (1960); Note, 65 Yale L. J. 339 (1956); ALI, Admin. of Crim. Law: Double Jeopardy (1935).

> dant to a second prosecution by discontinuing the trial when it appears that the jury might not convict. At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforeseeable circumstances . . . arising during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict.' *Wade* v. *Hunter*, 336 U. S. 684, 688-689."

Perez has been "the basis for all later decisions of this Court on double jeopardy" (*Wade* v. *Hunter, supra*, 336 U. S. at 690) and has served as the touchstone of decision for all Federal courts. The *Perez* rule is, as follows (9 Wheat. at 580):

> ". . . [T]he law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . ."

A. There were no circumstances of "manifest necessity" for a mistrial in this case.

Although the court below professes compliance with *Perez* (R. 24), its decision is irreconcilable with the principles of that ruling. For, in this case, a second trial of a defendant for the same offense is approved notwithstand-

ing that no necessity, let alone "manifest necessity", appears for the termination of the first trial before verdict.

Just why the trial court terminated the earlier trial in this case is nowhere clearly articulated. When he declared the mistrial, the trial judge said he was doing so "because of the conduct of the district attorney" (R. 14). But he did not say what that objectionable conduct was, and the attendant colloquy is not helpful. The other judges who subsequently examined the record interpreted it variously. On denying petitioner's subsequent motion for dismissal, on the plea, *inter alia*, of double jeopardy, the District Court judge wrote (R. 16):

> " . . . [T]he trial judge, apparently believing that certain questions asked of Government witnesses on direct examination were or might be prejudicial to the defendant, sua sponte exercised his prerogative and declared a mistrial. Though not sought by the defendant, the mistrial was obviously declared in his interest. . . ."

The majority of the Court of Appeals says (R. 23-24):

> " . . . [T]he prosecutor did nothing to instigate the direction of a mistrial . . . and was only performing his assigned duty under trying conditions. . . . This is borne out by the entire transcript. . . . Nor does it make entirely clear the reasons which led the judge to act, though the parties appear agreed that he intended to prevent the prosecutor from bringing out evidence of other crimes by the accused. Even so, the judge should have awaited a definite question which would have permitted a clear-cut ruling. But if he was thus over-assiduous, . . . it seems clear that he was acting according to his convictions in protecting the rights of the accused. . . ."

Judge Waterman, dissenting, remarks that his colleagues in the majority "clearly regarded" the action of the trial judge "as having been a mistaken action" (R. 31).

Whatever may have been the circumstances that moved the trial judge, what is certain is that this case does not present those "very plain and obvious causes" for early termination of trial which *Perez* contemplated, nor the "urgent circumstances" which alone, *Perez* tells us, warrant exposure of an accused to a second trial after discharge of an earlier jury (9 Wheat. at 580).

We are mindful that this Court has commended the breadth and flexibility of the *Perez* ruling and has rejected as inconsistent with its spirit any effort to impose "a rigid formula" on the double jeopardy concept. *Wade* v. *Hunter*, *supra*, 336 U. S. at 690. It has, however, never suggested that the *Perez* doctrine be watered down as it has been in the decision below.

Perez, as we have noted, confines cases of "manifest necessity" for early termination of trial to such as involve "urgent circumstances" and exhibit "very plain and obvious causes" for termination. Other courts have conceived "manifest necessity" as signifying "very extraordinary and striking circumstances" (Story *J.*, in *United States* v. *Coolidge*, 25 Fed. Cas. No. 14,858); "imperious necessity" (*Ex parte Glenn*, 111 Fed. 257 (N. D. W. Va.), rev'd on other grds., 189 U. S. 506); or "most urgent necessity" (*Cornero* v. *United States*, 48 F. 2d 69, 71 (9th Cir.)). The term may connote something less than these; it certainly requires more, however, than the barren record which attended the mistrial in this case. We know of no case in which a second trial has been allowed after an earlier

mistrial where, as here, the record revealed no incident occurring at the first trial which afforded even a colorable excuse for the mistrial.

Necessity manifested is at the very least necessity *clearly evidenced*. When, as here, the considerations that moved the trial judge to action are articulated, if at all, so vaguely as to leave the reviewing tribunal itself in a quandary, "manifest necessity" is indisputably lacking. The heart of the matter is that there was no necessity whatever, let alone "manifest necessity", for the mistrial in this case.

The "prosecutor did nothing to instigate the declaration of a mistrial and . . . he was only performing his assigned duty under trying conditions" (R. 23). There is no trace of any objectionable "conduct of the district attorney", which the trial judge suggested inspired his action (R. 14). No circumstance appears which might reasonably have compelled interruption of the trial. As Judge Waterman remarks: "The action of the district judge in ordering the mistrial, expressly characterized as 'over-assiduous' and 'over-zealous', is thus clearly regarded by my colleagues as having been a mistaken action" (R. 31).

Since "manifest necessity" for the mistrial was lacking, the *Perez* standard has not been met, and the judge below is plainly in error. Beyond this, it seems clear that the trial judge in this case did not even attempt to measure the circumstances of the first trial against the standard of "manifest necessity". As he declared the mistrial, the judge exclaimed: ". . . I don't care whether the action is dismissed or not" (R. 14). Irked and angered for some undefined reason, the judge failed to exercise the discretion vested in him or to apply the standard enunciated by *Perez*

and the later rulings of this Court. The Court's failure in these respects also compels reversal of the judgment below. See *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, 268; *Rogers* v. *Richmond*, No. 40, O.T. 1960, March 20, 1961.

B. The authority of trial judges to declare mistrials without the bar of former jeopardy attaching is not absolute but discretionary and reviewable by the courts of appeal.

The decision below marks a radical departure from, if not a complete abandonment of, the *Perez* doctrine. What is done is to substitute for the *Perez* rule of cautious limitation virtually an absolute power in the district courts to terminate trials and subject defendants to new trials.

That this is the meaning of the decision is confirmed by Government counsel's brief in opposition to the petition for a writ. Although, at one point, they urged encouragement and preservation of a "broad discretion" in the trial court (Br. in Opposition, p. 4), at another they made plain that what they were really supporting was the proposition that the "trial judge must be the ultimate arbiter" in declaring a mistrial even though, in doing so, he acts "with questionable judgment" (*Id.*, p. 7).

Perez, it is true, recognizes the authority in the trial judge "to exercise a sound discretion on the subject" of a trial's discontinuance. 9 Wheat. at 580. And *Brock* v. *North Carolina*, 344 U. S. 424, 427, affirms that this Court has "long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served. *Wade* v. *Hunter*, 336 U. S. 684; *Thompson* v. *United States*,

155 U. S. 271, 273-274". Judicial discretion, however, is something other than untrammelled power. It is a discretion "proceeding upon ascertained facts according to rules of law, and subject to review for apparent errors." *Barry* v. *Edmunds*, 116 U. S. 550, 566; *National Ben. Life Insurance Co.* v. *Shaw-Walker Co.*, 111 F. 2d 497, 507 (D. C. Cir.), cert. den. 311 U. S. 673; *Davis* v. *Peerless Insurance Co.*, 255 F. 2d 534, 536 (D. C. Cir.). Moreover, meaningful review contemplates intelligent articulation by the district judge of the rationale of his ruling. Cf. *Virginian Ry.* v. *United States*, 272 U. S. 658, 674-675; *S.E.C.* v. *Chenery Corp.*, 318 U. S. 80; *S.E.C.* v. *Chenery Corp.*, 332 U. S. 194, 196.

In the present case, the trial judge's declaration of mistrial has not been, because it cannot possibly be, tested within the frame of judicial discretion. The record is silent, so we cannot know why the judge deemed a mistrial necessary. It has been suggested that he believed the prosecutor was *about* to ask a question prejudicial to the petitioner, but that anticipated event concededly never occurred.

The Court of Appeals supplies no justification for the trial judge's action. Finding no rational basis, the court resorts to divination and faith. It sustains the mistrial declaration solely because "it seems clear [to the majority below] that . . . [the trial judge] was acting according to *his* convictions in protecting the rights of the accused" (R. 24, emphasis supplied).

Action by a judge on personal conviction, however, is quite different from the exercise of judicial discretion. Moreover, the subjective predilections, or convictions, the

"personal and private notions" of judges are irrelevant to the adjudication of personal constitutional rights. Cf. *Rochin* v. *California*, 342 U. S. 165, 170.

When an appellate court affirms a trial judge's ruling because it accords with "his convictions", it sustains virtually an absolute power in the trial court and abdicates its own duty of intelligent and responsible review. "Sound discretion" gives way to absolute power. Certainly, a defendant in our courts is entitled to more than assurance against merely the *mala fides* of the trial court. He has a right to protection from and correction of all prejudicial error, however well intentioned.

Although *Brock* v. *North Carolina*, *supra* (on which the court below relies) speaks of a "discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served" (344 U. S. at 427), it does not say that the trial court's measure of what will serve justice is final and indisputable. In *Brock*, the appellate courts could readily examine and did examine into the trial judge's exercise of discretion; the record there plainly revealed the basis for his action: a temporary unavailability, by reason of pleas against self-incrimination, of testimony vital to the prosecution. In the present case, contrariwise, the Court of Appeals could not, nor can this Court, effectively review the mistrial declaration, for the record here does not inform us of the basis for the trial court's action.

The high position the double jeopardy clause occupies in the fabric of our constitutional liberties requires more solicitude than is here exhibited for the right. "Fear and abhorrence of governmental power to try people twice

for the same conduct is one of the oldest ideas found in western civilization." *Bartkus* v. *Illinois*, 359 U. S. 121, 151 (Black, *J.*, dissenting). The principle was "so deeply rooted in the law of England, as an indispensable requirement of a civilized criminal procedure, [that it] was inevitably part of the legal tradition of the English Colonists in America... [T]he First Congress, which proposed the Bill of Rights, came to its task with a tradition against double jeopardy founded both on ancient precedents in the English law and on legislation that had grown out of colonial experience and necessities. The need for the principle's general protection was undisputed, though its scope was not clearly defined. Fear of the power of the newly established Federal Government required 'an explicit avowal in [the Constitution] . . . of some of the plainest and best established principles in relation to the rights of the citizens, and the rules of the common law.' *People* v. *Goodwin*, 18 Johns. (N. Y.) 187, 202 . . ." *Green* v. *United States*, *supra*, 355 U. S. at 200, 201 (Frankfurter, *J.*, dissenting).

The purposes which the constitutional guarantee serves attest to its great significance and its continued vitality. "The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts. 'The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and

insecurity . . .' *Green* v. *United States*, 355 U. S. 184, 187 . . ." *Abbate* v. *United States*, 359 U. S. 187, 199 (opinion of Brennan, *J.*).

We are mindful of the vital public interests in fixing responsibility for breach of our laws and in punishing those guilty of such breaches. But those interests of State were undoubtedly as cogent when the double jeopardy provision was written into our Bill of Rights. They did not then and should ~~they~~ not now justify abuse or disregard of the guarantee.

The court below directs us to no special circumstances or overriding considerations of policy which would justify curtailment of the constitutional right in this case. It is noteworthy that the considerations advanced in support of the decision below, such as they are, are quite irrelevant. We grant that a trial judge has "responsibility and discretion to discontinue a particular trial when justice so requires", that he "bears an affirmative responsibility for the conduct of a criminal trial", that this "responsibility is particularly acute in the avoidance of prejudice arising from nuances in the heated atmosphere of trial", that he must "retain control of his courtroom" and must act "to protect the interests of the litigants or to preserve proper respect for federal law administration" (R. 26-27). These observations are incontrovertible. But (to borrow Mr. Justice Frankfurter's characterization in another context) they denude our problem of "illuminating concreteness" (*Monroe* v. *Pape*, — U. S. —, No. 39, this Term, Feb. 20, 1961 [Frankfurter, *J.*, dissenting]). None of them is pertinent here.

The court below agrees that there was no justification for discontinuance of the first trial in this case. There is in

this record no suggestion of "prejudice arising from nuances in the heated atmosphere of the trial." No one threatened the judge's complete "control of his courtroom". No party suggested the need for discontinuance. No disrespect was shown the court or the processes of justice.

In short, the considerations articulated in support of the decision below are not pertinent to this case. Moreover, even were they germane, we must be mindful that there is also a vital public interest that the constitutional rights of the citizen not be eroded. As Judge Waterman says, "the maintenance of a court's authority and of a trial judge's control of a trial cannot be had at the expense of a defendant's constitutional rights" (R. 33). See *United States* v. *Andolschek*, 142 F. 2nd 503, 506 (2nd Cir.). Even on occasions when the defendant or his counsel is at fault, courts have been reluctant to subordinate constitutional rights to the public interest. See *United States* v. *Whitlow*, 110 F. Supp. 871 (D. D. C.).[5]

---

[5] This Court has approved retrial of a defendant before a second jury after an earlier mistrial where the first jury has been unable to agree upon a verdict (*United States* v. *Perez, supra; Keerl* v. *Montana*, 213 U. S. 135; *Logan* v. *United States*, 144 U. S. 263, 298; *Dreyer* v. *Illinois*, 187 U. S. 71); where an urgent military situation has made continuance of the first trial physically impossible (*Wade* v. *Hunter, supra*); and where the objectivity of the first jury has been impaired (*Simmons* v. *United States*, 142 U. S. 148; *Thompson* v. *United States*, 155 U. S. 271).

The draft of the statute on double jeopardy recommended by the American Law Institute may be of interest. It reads, in pertinent part, as follows:

> "Section 1.09. *When Prosecution Barred by Former Prosecution for the Same Offense.*
>
> When a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former

The concluding paragraph of the prevailing opinion below itself betrays considerable reservation by the court as to the propriety of its ruling. We are assured that petitioner "was in no way harmed by the brief trial . . ." (R. 27). Literally, that may be true. But if the court suggests that petitioner has not been injured by termination of the first trial and retrial, the facts are otherwise. As a consequence of a second trial to a second jury, petitioner stands convicted and sentenced to imprisonment for a period of three and one-half years (R. 18). So far as anyone can tell, had the case been permitted to go to the first jury, discharged without petitioner's consent, petitioner might

---

prosecution, it is barred by such former prosecution under the following circumstances:

* * * * *

(4) The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:

(a) The defendant consents to the termination or waives, by motion to dismiss or otherwise, his right to object to the termination.

(b) The trial court, in the exercise of its discretion, finds that the termination is necessary because:

(1) it is physically impossible to proceed with a trial in conformity with law; or

(2) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or

(3) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without manifest injustice to either the defendant or the State; or

(4) the jury is unable to agree upon a verdict; or

(5) false statements of a juror on voire dire prevent a fair trial." (ALI, Model Penal Code, Tentative Draft No. 5 (1956), pp. 44-45)

well have been acquitted. Thus, to tell petitioner that the first trial, being brief, was harmless affords him little solace for the deprivation of his constitutional right to be tried only once for the offense charged.

Nor is it any answer to note, as the court below does (R. 24, 28), that on the retrial petitioner was convicted. That is quite irrelevant to the issue whether it was proper to have tried him twice. When it emphasizes petitioner's conviction and repeatedly characterizes his plea of former jeopardy as one for "absolution for his crime" (R. 24, 28), we deferentially suggest the court doth protest too much. It seems to display a somewhat inordinate concern lest an accused in a criminal case go unpunished and a somewhat less than sufficient concern that he be assured his rights under the Constitution. What the court appears to suggest is that rulings on pleas of former jeopardy be postponed to abide the event of second trials. Submit the defendant to retrial. If he be convicted, he must be guilty; the plea is rejected. If he be acquitted, that is an end to the matter; the plea becomes moot and need not be determined at all. The procedure is tempting in its simplicity and foolproof certainty. Unfortunately, however, it thwarts the very purpose of the plea: to protect the accused from the jeopardy of a second trial.

The early opinion of Mr. Justice Livingston in *People* v. *Barrett*, 1 Johns. 66, 72, 74-75 (N. Y. 1806), subsequently cited with approval by this Court in *United States* v. *Ball*, 163 U. S. 662, 667, seems much more consonant with the spirit and letter of the Fifth Amendment:

> "... a power to try *ad infinitum*, as often as some latent defect be discovered in an indictment, may

not only be abused in the hands of an attorney general, but is unsafe in those of a court. If judges have the power of putting a party on his defence a second, and a third time, because of imperfections of this kind, there is no man who may not, if the court please, be finally convicted, or cruelly harrassed by such a course of proceeding. It is a sufficient argument against the assumption of such power, that it is subversive of the trial by jury, and that it is liable, in seasons of political conflicts, to great abuse. Judges are but men, and not more secure than others against improper influence."

II.

In any event, misconduct by a prosecutor cannot constitutionally justify declaration of a mistrial and retrial of the defendant for the same offense unless first he has consented to the mistrial. Since petitioner here did not consent, his retrial violated the double jeopardy provision of the Fifth Amendment.

We have demonstrated that the judgment below must be reversed because the record utterly fails to disclose that "manifest necessity" which, according to *Perez, supra,* alone justifies retrial of a defendant in the Federal courts after earlier termination of a first trial before verdict. We have shown further that, in vesting a trial judge with absolute power to declare a mistrial and to subject a defendant to retrial, the decision violates the rule in *Perez* and the constitutional interdiction of double jeopardy. There is a further reason why the decision below cannot stand: that, in any event, absent the defendant's consent, a prosecutor's misconduct cannot justify a mistrial and retrial of an accused in the Federal courts.

Although the majority below absolves the prosecutor in this case from any charge of misconduct (R. 23), we shall assume, for purposes of this argument, that he was guilty of misbehavior and that the trial judge acted to protect petitioner from the resulting prejudice. Even on that assumption, termination of the first trial without petitioner's consent and his retrial violated the constitutional provision as to double jeopardy.

Judge Waterman succinctly states the argument, as follows (R. 31):

> "Even if all other questions in the law of former jeopardy remain unsettled it is clear that in the or case where the trier of fact has fully considered the evidence against a defendant and the defendant has been acquitted that man may not thereafter be prosecuted for the same offense. *United States* v. *Ball*, 163 U. S. 662, 669-670 (1896). As a corollary, a prosecuting attorney, sensing that the trier of fact will acquit if the case being tried is completed, may not enter a 'nolle prosequi' during the trial without the bar of former jeopardy attaching. See *Green* v. *United States*, 355 U. S. 184, 188 (1957); *Cornero* v. *United States*, 48 F. 2d 69, 71 (9 Cir. 1931); *Ex parte Ulrich*, 42 Fed. 587, 595 (W. D. Mo. 1890); *app. dism'd*, 189 U. S. 789; *United States* v. *Shoemaker*, 27 Fed. Cases No. 16,279 (D. Ill. 1840); and cf. Frankfurter, J., concurring, *Brock* v. *North Carolina*, 344 U. S. 424, 428-29 (1953). Therefore, what the prosecuting attorney is forbidden to do directly by nolle he ought not to be permitted to do indirectly by way of trial misconduct. I would hold that misconduct by a prosecuting attorney during trial may not deprive a defendant without his consent of the right to have that trial completed."

The vice of permitting a district judge to terminate a trial for the defendant's protection because of the prosecutor's misconduct and thereafter to subject the defendant to a second trial for the same offense is two-fold: (1) it permits, if indeed it does not encourage, an ineffective prosecutor or one whose case appears weak to provoke the declaration of mistrial and thus to secure the advantage of a fresh start; and (2) it deprives an accused of that effective assistance of counsel which the Sixth Amendment guarantees him.

The prosecutor is victim to the foibles of all men. Unfortunately, he is too often more intent on securing a conviction than on assuring a fair trial. See, e.g., *Napue* v. *Illinois*, 360 U. S. 264, 269-270, and cases cited. If his case proves weak or the jury unsympathetic and he believes he can secure a mistrial and retrial whether or not the defendant's counsel consents, he will be prone to indulge in misbehavior to provoke a declaration of mistrial. Undoubtedly, it is that consideration which, as Judge Waterman points out (R. 31-32), has led courts to sanction retrials generally only where the factors inspiring them have not been within the control of the prosecution. "This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." *Green* v. *United States*, 355 U. S. 184, 188. As Mr. Justice Frankfurter said, concurring, in *Brock* v. *North Carolina*, *supra*, 344 U. S. at 429:

> "A State falls short of its obligation when it . . . prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a

prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."

Where the trial judge believes a mistrial necessary to protect the defendant against prejudice caused by misconduct of the prosecutor, it seems eminently sound to condition termination of the trial on the prior consent of the defendant. The interests of society in assuring a fair trial to the accused is thus amply satisfied. Notwithstanding apparent prejudice to the defendant's interest and the readiness of the court for that reason to terminate the trial, should the defendant choose to go ahead with the trial, he could not, in the event of conviction, urge a reversal on that ground. "A defendant cannot experiment on an acquittal, and then upon conviction take the position that . . . [the error] was so prejudicial as to entitle him to a new trial." *Etie* v. *United States*, 55 F. 2d 114, 115 (5th Cir.). See, also, *Claunch* v. *United States*, 155 F. 2d 261, 263 (5th Cir.); *Devine* v. *United States*, 278 F. 2d 552, 556 (9th Cir.). On the other hand, should defendant consent to the mistrial, he could not thereafter object to the second trial.

This rule of procedure avoids the serious constitutional question inevitably presented by declaration of a mistrial, as in this case, without the defendant's consent. If a trial judge be allowed to "protect" a defendant, notwithstanding his failure to ask such "protection", and to subject the defendant to the jeopardy of a second trial, the defendant is *pro tanto* deprived of that effective assistance of counsel guaranteed him by the Sixth Amendment. The Constitution assures an accused the assistance of counsel

of his own choosing, not the assistance of the court acting as counsel.

In the present case, the trial judge completely ignored petitioner. He did not deign even to consult petitioner or his counsel. Irritated by the *anticipation* of misconduct by the prosecutor, abruptly and in the presence of the jury, the court declared the mistrial without affording petitioner or his counsel an opportunity to speak. The dramatic suddenness of the mistrial declaration made it impossible for petitioner and his counsel even to confer.

It may be a trial judge's prerogative, as the court below says (R. 27), to "retain control of his courtroom." It is not his prerogative, as the court seemingly asserts, to control the conduct of the defendant's case. As Judge Waterman stated (R. 32-33), "the district judge must give the defendant the right to decide whether his interests will be better protected by having a new trial or by proceeding with the present one. The defendant here was denied that choice; his retrial should not be permitted."

The rule urged by Judge Waterman, which we endorse, is in all respects fair. It permits termination of a trial and the retrial of a defendant where, on the first trial, "an event occurred which prevented the completion of the jury's function" (*Crawford* v. *United States*, 285 F. 2d 661, 663 (D. C. Cir.)) or for compelling "circumstances of such nature that neither the court nor the attorney nor the parties have any control over them" (*State* v. *Whitman*, 93 Utah 557, 559, 74 P. 2d 696, 697). It prevents, however, a prosecuting attorney who believes a case is running against him from avoiding an acquittal by uni-

laterally provoking a mistrial; thus, it does not permit "a party to take advantage of his own wrong." *People* v. *Barrett, supra,* 1 Johns, 66, 72 (Livingston, *J.*, dissenting). It prevents a judge confronted with an inept or unprepared prosecutor from *sua sponte* holding the defendant over to a new trial where the case against him might be better prepared. It saves the defendant, whose resources may by that time be exhausted, the harassment, expense and jeopardy of a new trial. It fully honors the trial court's responsibility to assure a fair trial. It leaves the choice of exposure to the jeopardy of successive trials where the choice properly belongs, to the defendant and his counsel.

Government counsel have argued (Br. in Opposition, p. 5) that to forbid retrial after judicial *sua sponte* declaration of mistrial for prosecutor misconduct would be to "codify the rules of manifest necessity and double jeopardy into a rigid abstract formula", contrary to the admonition of this Court that a "rigid formula is inconsistent with the guiding principles of the *Perez* decision." *Wade* v. *Hunter, supra,* 336 U. S. at 691. That admonition, however, was, we are certain, not intended to forbid salutary rules, such as we urge here, designed to safeguard the constitutional guaranty against impairment. The principle Judge Waterman espouses is no more "rigid" than that fixed in *Perez*: that in the event of the inability of a jury to agree on a verdict, a trial may be terminated and the defendant subjected to a retrial.

III.

Petitioner did not waive his rights under the double jeopardy provision of the Fifth Amendment.

If we correctly read the decision below, it is in part posited upon a finding that petitioner waived his constitutional right not to be subjected to double jeopardy. Judge Waterman, dissenting, reads it likewise, although he finds "the court's opinion unclear on this point" (R. 33). Government counsel, however, have unequivocally stated that the "question of waiver by consent does not play a part in this case" (Br. in Opposition, p. 7). If that is so, of course, the question need not be considered by this Court.

In any event, the record makes plain that petitioner did not waive any of his rights under the double jeopardy provision of the Constitution. In view of the haste of the trial judge's action, the fact that the mistrial declaration occurred in the presence of the jury, and the consequent futility of speaking to it, one cannot reasonably derive consent from petitioner's passive "acquiescence" (R. 24) in the trial court's abrupt ruling. As Judge Waterman says: "In the present case . . . the possibility of a mistrial had not been suggested until almost immediately before the district judge angrily ordered a juror discharged. The suddenness and vehemence of the order renders it highly unrealistic for us to imply consent here from . . . [petitioner's] failure to protest" (R. 34).

This Court has repeatedly admonished that there is a strong presumption against waiver of fundamental rights by an accused and that such rights must ever be jealously and vigilantly guarded by the courts. See *Johnson* v. *Zerbst*, 304 U. S. 458, 464; *Glasser* v. *United States*, 315 U. S. 60, 70; *Von Moltke* v. *Gillies*, 332 U. S. 708, 723. Mind-

ful of that rule, it would be most inappropriate to construe a waiver in this case. As the Ninth Circuit Court said, in *Himmelfarb* v. *United States*, 175 F. 2nd 924, 931:

> "The mere silence of an accused or his failure to object or to protest a discharge of the jury cannot amount to a waiver of this immunity. 'It would be a harsh rule to hold that defendant consented to a withdrawal of the case from the jury simply because he interposed no objection.' State v. Richardson, 47 S. C. 166, 25 S. E. 220, 222, 35 L. R. A. 238."

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and a judgment of acquittal directed in this case. The decision of the Court of Appeals violates the well established principles of *Perez*. It radically impairs, if indeed it does not annul, the constitutional guarantee against double jeopardy. The caveat announced a century and a half ago by Mr. Justice Livingston when, as here, the rule against double jeopardy was under attack, is particularly pertinent: "It will be much better that the guilty now and then escape, in this way, than to introduce, or sanction, a practice which may place the innocent entirely in the power of a court, or a public prosecutor, which this mode of trial was intended to guard against" (*People* v. *Barrett*, 2 Caines (N. Y.) 304, 309 (1805)).

Respectfully submitted,

MILTON C. WEISMAN
HARRY I. RAND
JEROME LEWIS
Attorneys for Petitioner

March, 1961.